No. 15010

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD O. BOREN CONTRACTING CO., INC., a California corporation; CLIFFORD O. BOREN, President, CLIFFORD O. BOREN CONTRACTING CO., INC.; and DELTA M. BOREN, Vice-President, CLIFFORD O. BOREN CONTRACTING CO., INC.,

Appellants,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue Service,

Appellee.

On Appeal from the United States District Court for the Southern District of California, Southern Division

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REPLY BRIEF FOR THE APPELLANTS

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STATUTES

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REPLY BRIEF FOR THE APPELLANTS

STATEMENT

The Appellants have confined their statements and arguments to matters which appear in the record on appeal. Appellee has not seen fit to stay within the record on appeal. We therefore feel compelled to comment upon Appellee's excursions from the record.

Appellee has referred to an indictment returned by the Federal Grand Jury on April 25, 1956, in *United States* v. *Del L. Brandow, Charles D. Ford, et al.,* Southern District of California, No. 24955-CD. [Br. 4] Appellants therefore believe it necessary to place before this Court a complete copy of the indictment, which is printed in the Appendix, *infra,* and to call this Court's attention to the allegations contained in Appellants' second separate defense, paragraphs II, III, IV, V and VI, [R. 20-21], and to Count One through Seven of said indictment.

Appellee has stated that he was informed that endorsements on certain payroll checks of Appellant corporation "were forged" (Br. 5-6), and that he "found evidence that payroll checks of the corporation were being issued, endorsements being forged, checks cashed, and the proceeds going not to the payee but to the taxpayers . . . " [Br. 9-10] The evidence in the record on these statements is Appellee's affidavit. [R. 34] An examination of said affidavit will show no evidence of forgery, cashing of checks, or receipt by the taxpayers of

the proceeds. These are rank speculations by Appellee.

Appellee states that he was assigned to the investigation during the course of Ford's investigation, "but did not actually get involved in the investigation" until after Ford resigned, the report of Ford's solicitations had been made, and a new agent assigned to the case. The evidence is that Appellee was assigned at the request of Ford on May 11, 1954, almost five months before the taxpayers reported Ford's activities; and that Appellee did not commence his *examination* of the returns of Appellants Clifford O. Boren and Delta M. Boren until October 20, 1954. [R. 116-117] There is no evidence that Appellee was not "involved in the investigation" in ways other than examining the Appellants' returns between May 11, 1954 and October 6, 1954, the date the activities of Ford were reported.

Appellee states that "Delta and Clifford Boren are the owners" of the Boren Company. [Br. 14] The record is that they are the vice president and president, respectively, of Appellant corporation. [R. 49] The ownership of the Appellant corporation is not shown by the record.

Appellee states that ". . . he has not completed his report or made any recommendation to his superiors . . ." [Br. 26] The record is devoid of any evidence relative to this statement.

Appellee states that "By refusing to rely on the preliminary work of the 'suspect' former Agent, Ford, the Government leaned over backwards not

to prejudice the taxpayers." [Br. 12-13] The record does not show that the Government refused to rely on the work of Ford. On the contrary, there are strong indications that Appellee has in fact relied upon Ford's work throughout the investigation. This will be discussed further in Part I of this brief.

The indictment, evidence of forgery, cashing checks and receiving the proceeds thereof, the lack of involvement of Appellee in the investigation during a period of almost five months after he was assigned to the case, the ownership of the Boren Company, the absence of a report or recommendation by Appellee, the Government's refusal to rely upon Ford's work, the Government — personified by Appellee and Revenue Agent Calkins — "leaning over backwards not to prejudice the taxpayers", — all matters *de hors* the record — are tempations for Appellants likewise to go outside the record for the purpose of demonstrating the truth or falsity of the statements, further background of the examination, and possible motives of Appellee and Revenue Agent Calkins. However, we do not believe this Court is interested in making factual determinations to supplement the record on appeal by briefs unsupported by sworn testimony. If the Court believes any of these matters to be material to the determination of the issues involved, further proceedings should be had.

For convenience in discussing Appellee's arguments, we will follow Appellee's organization.

ARGUMENT

I

THE DISTRICT COURT ERRED IN FINDING APPELLANTS IN CIVIL CONTEMPT.

A. Whether the examination of the individual taxpayers has terminated is not determinative. The determinative question is whether Appellee has made one examination of Appellant corporation's books of account.

The burden of the argument of Appellee that the examination of the income tax liability of Appellants Clifford O. Boren and Delta M. Boren which commenced November 2, 1953 never terminated and is still continuing, is that the examination by Appellee and Revenue Agent Calkins is not a re-examination, but a "fresh start" precipitated by the taxpayers' accusations against former Revenue Agent Ford. [Br. 11-13] Appellee reasons that since the "fresh start" shows a continuing examination of the individual taxpayers, there is no re-examination of the corporate taxpayer. This evidences a misconception of the issues here involved.

Appellants have not in this proceeding contended that the examination commenced by Appellee and Revenue Agent Calkins on October 20, 1954 was a proscribed re-examination of the Appellant corporation's books and records. Rather their contention is that the examination sought by the summonses is a re-examination sought by Appellee,

after Appellee and Revenue Agent Calkins had made a complete and detailed examination of Appellant corporation's books and records in connection with the tax liability of Appellants Delta M. Boren and Clifford O. Boren for the years 1950 and 1951 between the period October 20, 1954 and July 15, 1955. The primary issue is whether he is entitled to make a re-examination under the circumstances.

Appellee states that after the issuance of notices of deficiency to the individual Appellants he was first informed that one of the persons carried as an employee of Appellant corporation was not a bona fide employee. [Br. 12] This does not comport with the facts.

The Appellants brought out at the hearing the fact that the affidavit of said employee was dated March 16, 1955. Appellee was in doubt as to the date of the affidavit. [R. 132, 140] However, Appellee testified that the notices of deficiency issued under date of March 11, 1955 to Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 contained adjustments based on information obtained from the examination of Appellant corporation's payroll records and checks, and since the issuance of the notices of deficiency, Appellee testified, he had not obtained any other information showing that any other particular payroll checks or deductions should be disallowed for the year 1951. [R. 128]

The conclusion necessarily follows that the information which was contained in the affidavit dated March 16, 1955 was obtained prior to that date, and prior to the issuance of the notices of deficiency.

However, the precise date Appellee obtained his information is not of great consequence. If it is assumed that the information was not obtained until March 16, 1955 the results would not be affected. The Court found as a fact that Appellee did not want to examine the books and records for the purpose of adujusting or changing the notice of deficiency. [R. 58] Furthermore, between March 16, 1955 and July 15, 1955, Appellee had adequate opportunity to examine the books and records sought by the summonses. [R. 120-121] It must also be recalled that Appellee had available for examination, and did examine, the books and records sought, including *all* the payroll checks, and extensive notes and transcripts were made from the books and records. [R. 52] Appellee abstracted from the payroll checks all information contained thereon. [R. 136-137]

Appellee argues that he sought to have the checks photographically reproduced " . . . to determine whether then to impose additional civil fraud sanctions . . . " [Br. 12]

Appellee testified that adjustments had been made in the notices of deficiency on the basis of information obtained by him in his examinations, that since the issuance of the notices of deficiency no additional information in derogation to the pay-

roll deductions or checks had been obtained. [R. 128] Furthermore, the full measure of civil fraud sanctions had been imposed against Appellants Clifford O. Boren and Delta M. Boren in the notices of deficiency. [R. 56] In addition, the Court found that Appellee had acknowledged that he did not want to examine the records and checks for the purpose of adjusting or changing the notices of deficiency. [R. 57-58]

Appellee asserts in his brief that "By refusing to rely on the preliminary work of the 'suspect' former agent, Ford, the Government leaned over backwards not to prejudice the taxpayers." [Br. 12-13] This deserves examination.

At the request of the now indicted Ford, Appellee was assigned to assist in the examination. [R. 108] Appellee states in his brief that he was primarily concerned with the investigation of alleged evasion of tax. [Br. 25] This assignment was made on May 11, 1954, almost five months prior to the report by one of the Appellants of Ford's solicitations. Appellee testified that he did not commence his examination until October 20, 1954. [R. 11] On that date, and without previously investigating, Appellee informed counsel for Appellants that he intended to conduct a criminal investigation of the returns of Appellants Clifford O. Boren and Delta M. Boren for the years 1950 and 1951. Appellee's associate, Revenue Agent Calkins, had not, prior to October 20, 1954, investigated these

returns. [R. 117] Appellee testified that on October 20, 1954 he had memoranda which had been prepared by Revenue Agent Ford [R. 118], and had seen memoranda prepared by Revenue Agent Miller, who was associated with Revenue Agent Ford in the examination of Appellants' returns. [R. 118-119]

From the foregoing it is probable the government has in fact relied on the "preliminary work of the 'suspect' former agent, Ford . . ."

The information relative to the employee did not come into Appellee's knowledge until sometime after February, 1955. [R. 140] Appellee asserts in his affidavit [R. 12] that "Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of $40,000.00 of taxable income was not reported . . . " This affidavit was subscribed on September 19, 1955. The information relative to the employee which Appellee states he obtained relates only to $2,817.97 of salary deducted by Appellant corporation, and $2,853.03 by Appellant Clifford O. Boren. No evidence of any kind was introduced by Appellee concerning the difference between the salary amounts and the $40,000.00. It is not known whether the "$40,000.00" includes, or is in addition to the salary items. Since Appellee commenced his examination with the avowed purpose of conducting a criminal investigation, with no prior investigation by him or his associate Revenue Agent Calkins, it is a reasonable inference that

the "$40,000.00" was the basis for his criminal investigation and was a product of the efforts of Ford and his associate Miller.

The Court's attention is called to Count Five of the indictment in the Appendix, wherein is alleged a conspiracy involving Charles D. Ford which resulted in the assertion by one of the conspirators, another revenue agent, that a taxpayer had a deficiency of approximately $146,000.00, and the examination was not yet completed. It is further alleged therein that this asserted deficiency was false.

> B. The evidence does not support the findings that the records sought by the summonses are material, relevant and necessary to Appellee's investigation.

This subject was fully discussed in Appellants' brief, pages 28 to 33, and will not be reiterated.

It is to be noted, however, that Appellee discusses only the materiality of the payroll checks. He has apparently abandoned his assertion that the other records sought by the summonses are material to his investigation.

Appellee premises an argument on the statement that the individual Appellants "are the owners" of Appellant corporation. This is not supported by the record.

> C. The District Court did not exercise its independent judgement as to what documents and entries were relevant.

The books and records sought by the summonses were, at the request of the Court, brought before the Court by the Appellants. They were available to the Court for its examination to determine whether the records called for contained an item or items having a real bearing on the matter under investigation. The testimony of Appellee and Revenue Agent Calkins shed very little light upon what matters the records contained which had a bearing on the tax liability of Appellants Clifford O. Boren and Delta M. Boren. [R. 138, 143-145]

Furthermore, it must be remembered that Appellee and Revenue Agent Calkins had previously made a thorough examination of the records and had extensive notes and transcripts therefrom.

D. Appellants have stated legally sufficient reasons for declining to produce the records demanded.

Appellee argues that Appellants never stated any legally sufficient reason for declining to produce the summoned records. The lower Court held that the answer, and the third through eighth separate defenses, were legally sufficient defenses. [R. 75-76]

The defenses to the petition were considered at length in Appellants' opening brief. However, a comment on the fourth defense is pertinent.

Appellants alleged that throughout the course of the examination being made by Appellee and Revenue Agent Calkins the books and records

sought by Appellee in his summonses were available to him. Appellants also alleged that Appellee spent less than 5% of his time actually examining the books and records, and more than 95% of his time was devoted to leisurely relaxing and enjoying the comforts afforded by the offices of counsel for Appellants. [R. 26]

The lower Court found as a fact that Appellee and Revenue Agent Calkins had available for examination, and did examine all the records sought herein, and extensive notes and transcripts thereof were made. [R. 51-52] Appellee testified that he devoted only a "small amount" of his available time to the examination of these books and records. [R. 121]

This defense, which the lower Court had found to be legally sufficient, was disposed by a finding that Appellee had never been given "exclusive possession or control" of said records, that he was permitted to examine the records only in the presence of counsel for Appellant corporation, and was denied permission to photographically reproduce the records. [R. 57]

Appellee's failure to utilize the opportunities which he had to further examine the books and records is a defense to Appellee's action. Appellee is authorized to make only reasonable and necessary examinations. Through the present action Appellee seeks to re-examine Appellant's books and records after a thorough, complete and detailed examination

had been made. Appellee testified in response to a question by the Court that he had full opportunity to make a complete examination of the checks. [R. 120] Since the examination was made, no additional information was obtained by Appellee. If he now believes it necessary to re-examine Appellants' books and records, this necessity must be ascribed to a failure on his part to sufficiently utilize his prior opportunities. It is unreasonable to require a taxpayer to be subjected to a re-examination, especially one as broad in scope as required by the summonses, simply because Appellee failed to take advantage of his opportunities.

The authority to examine books and records does not require a taxpayer to give the examining agent "exclusive possession or control." A taxpayer is entitled to be present in person or by counsel of his choice at an examination conducted under the authority of a summons issued under Section 7602, IRC 1954. He is no less entitled to be present in person or by counsel at an examination conducted under said section without the issuance of a summons.

The facts which brought about the indictments set forth in the Appendix, and that fact that Appellee was assigned to the investigation at the request of Ford approximately five months prior to the report of the solicitations, were ample, cogent reasons for the presence of counsel throughout the examination.

II

THE DISTRICT COURT ERRED IN ORDERING APPELLANTS TO PRODUCE CERTAIN RECORDS FOR PHOTOGRAPHING BY APPELLEE.

The burden of Appellee's argument that he is entitled to demand that the books and records of Appellant corporation be photographically reproduced is that if revenue agents were not allowed to record for their use the information appearing on the books and documents, the authority conferred by Section 7602 would be hollow and meaningless.

The obvious answer to this argument is that Appellee and Revenue Agent Calkins *have* recorded for their use the information contained in the books and records sought. The District Court found as a fact that Revenue Agent Calkins made extensive notes and transcripts from the books and records sought, and from the payroll checks and records. The District Court also found as a fact that Appellee made abstracts of information from the payroll records and checks. [R. 52] The testimony of Appellee shows that his examination of the payroll checks was most complete. [R. 136-137]

Appellee argues that the present case does not in any way involve an illegal search and seizure in violation of the Fourth Amendment, but involves the production by legal process of the records of a third party. [Br. 24]

We have demonstrated that the examination sought by the summonses is unnecessary, unreasonable in scope, in excess of the authority conferred by section 7602, IRC 1954, for a purpose not within the statute, and does not comply with the requirements of Section 7605(b), IRC 1954.

As this Court recently pointed out " . . . such proceeding is in the nature of a search and seizure which has constitutional overtones, *especially when directed to a third person,* . . . Such a demand, to be constitutional, must constitute a reasonable exercise of the power granted. A third party is within his rights to refuse such a demand and test the matter in Court." [Emphasis supplied]

> *Local 174, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al,* v. *U.S.,* ..... *F. 2d* ....., *CCA-9, No. 14,746*

The case of *Westside Ford* v. *United States,* 206 F.2d 627, (CCA-9) cited by Appellee, [Br. 23-24] related to a grant of authority to the President as a part of his emergency powers, which authorized inspections far greater in scope than Section 7602, IRC 1954. This authority granted under the Defense Production Act of 1950 provided that the "President shall be entitled . . . by regulation, subpena or *otherwise* to obtain such information from . . . make *such inspection* of the books, records, and other writings, premises or property of . . . any

other writings, premises or property of . . . any person as may be appropriate, in his discretion . . . " 50 U.S.C.A. Appendix, Section 2155(a). The authority thus conferred left in the President's discretion the means of investigation as well as the subjects of investigation. The authority granted in Section 7602, IRC 1954, to "examine" does not confer such discretion on Appellee.

Furthermore, the *Westside Ford* case involved records required to be kept as an aid to the enforcement of a regulatory statute and under the doctrine of *Shapiro* v. *United States,* 335 U.S. 1, would be public records, which is not true in this case.

III

WHERE THE ADMITTED PURPOSE OF THE EXAMINATION IS TO SECURE EVIDENCE FOR CRIMINAL PROSECUTION, IT IS OUTSIDE THE AUTHORITY CONFERRED BY SECTION 7602, IRC 1954.

Appellee's argument is that in any examination there is a possibility of unearthing a criminal violation and this possibility should not negate or restrict the agent's authority. This is obviously true. However, here we are not dealing with such a general possibility.

Appellee has testified that one of his express purposes in issuing the summonses was to assist in the preparation of a criminal case. [R. 134] Realistically viewed, the background of the examination and the evidence, permits the reasonable inference that Appellee's sole purpose is to assist in the preparation of a criminal case.

In *United States* v. *O'Connor,* 118 Fed. Supp. 248, (D.C. Mass., 1953) discussed by Appellee in his brief, page 26, the facts showed that *one* of the purposes for issuing the summons was to aid in a criminal prosecution. In that case the government argued, page 250, that ". . . so far as this Court knows there may be many other purposes more obviously appropriate to the direct interest of the Treasury and the direct concern of [the Special Agent]." The Court refused to enforce the summons.

It is again to be noted that although Appellee

asserts that ". . . he has not completed his report or made any recommendation to his superiors. . . " [Br. 26] there is no support for this statement in the record.

CONCLUSION

The Judgement and Order of the District Court should be reversed.

Respectfully submitted,

JOHN A. BRANT
Attorney for Appellants

July, 1956.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA
(CENTRAL DIVISION)

UNITED STATES OF AMERICA, Plantiff, v. DEL L. BRANDOW, CHARLES D. FORD, WILLIAM C. RAU, and WILLIAM E. WALLACE, Defendants.	) No. 24955-CD) INDICTMENT) (U.S.C., Title 18, Sec.) 371-Conspiracy; U.S.) C., Title 18, Sec. 1001-) False statements; U.) S.C., Title 26, 1954) Ed., Sec. 7214(a)(5)) and U.S.C., Title 26,) 1954 Ed., Sec. 7214) (a)(6) - Defrauding) the United States)

The grand jury charges:

COUNT ONE

[18 U.S.C., Section 371]

That on or about the 8th day of September, 1954, and continuously thereafter up to and including the 6th day of October, 1954, in the Southern District of California, WILLIAM C. RAU, late of Los Angeles, California; DEL L. BRANDOW, late of La Canada, California; and CHARLES D. FORD, late of San Diego, California, and sometimes hereinafter called the defendants, did unlawfully, knowingly and willfully conspire, combine, federate and agree together and with each other to defraud the United States of its right to have the lawful function of its Internal Revenue Service exercised and

performed freely from unlawful impairment and obstruction and free from corruption, improper influence, dishonesty and fraud, and free from unauthorized disclosure of its confidential information, information obtained through the efforts of its employees and the results of its investigations; and that during the existence of said conspiracy one or more of the accused, as hereinafter mentioned by name, did the following acts in furtherance of and to effect the object of the conspiracy as aforesaid:

1. That on or about the 8th day of September, 1954, CHARLES D. FORD, then a revenue agent in the employ of the Internal Revenue Service, stated in a telephone conversation with Mrs. Delta M. Boren that he was a revenue agent working on her tax case and that he was shortly leaving the Government and that her representatives were not properly handling her case and that he, Ford, could be very helpful to her.

2. That on or about the 14th day of September, 1954, CHARLES D. FORD conferred with Delta M. Boren at her home in San Diego, California, and stated to her that her attorneys were not properly handling her case and that she would be much better off to employ him, Ford, and his associate, WILLIAM C. RAU, an attorney.

3. That on or about the 15th day of September, 1954, CHARLES D. FORD and DEL L. BRANDOW conferred with Delta M. Boren at her home in San Diego, California, and stated that her attorneys

were not handling her case properly; that they, the defendants, could save her a lot of money and keep her out of jail because of their knowledge of the Government's case if she would employ them.

4. That on or about the 28th day of September, 1954, CHARLES D. FORD, DEL L. BRANDOW, and WILLIAM C. RAU conferred with Delta M. Boren at her home in San Diego, California, and stated to Mrs. Boren that her attorneys were not properly handling her case and that they, the defendants, could save her a substantial amount of money because of their knowledge of the Government's case, if retained.

COUNT TWO

[U.S.C., Title 18, Sec. 1001]

That on or about the 26th day of October, 1954, DEL L. BRANDOW, late of La Canada, California, did willfully and knowingly make and cause to be made false and fraudulent statements and representations in a matter within the jurisdiction of a department and agency of the United States by signing an affidavit before Special Agent Francis S. Sullivan and Special Agent Walter Schlick, both of the Internal Revenue Service, Treasury Department of the United States, at Los Angeles, California, in the Southern District of California, which affidavit stated that at no time during the discussions at Mrs. Boren's house did Mr. Ford or anyone else state directly or imply that Mr. Ford was

willing to disclose the Government's case and further stated that Charles D. Ford at no time discussed the tax features of the Boren case with him, whereas, as he then and there well knew, he (Del L. Brandow) did state and imply during the conversations at Mrs. Boren's house on September 15 and September 28, 1954, that Ford had disclosed the Government's case to him and that Ford was willing to disclose it for Mrs. Boren's benefit.

COUNT THREE

[U.S.C., Title 18, Sec. 1001]

That on or about the 26th day of October, 1954, WILLIAM C. RAU, late of Los Angeles, California, did willfully and knowingly make and cause to be made, false and fraudulent statements and representations in a matter within the jurisdiction of a department and agency of the United States by signing an affidavit before Special Agent Francis S. Sullivan and Special Agent Walter Schlick, both of the Internal Revenue Service, Treasury Department of the United States, at Los Angeles, California, in the Southern District of California, which affidavit stated that at no time during the discussions at Mrs. Boren's house did Mr. Ford or anyone else state directly or imply that Mr. Ford was willing to disclose the Government's case and further stated that Charles D. Ford at no time discussed the tax features of the Boren case with him, whereas, as he then and there well knew, he (William C.

Rau) did state and imply during the conversations at Mrs. Boren's house on September 28, 1954, that Ford had disclosed the Government's case to him and that Ford was willing to disclose it for Mrs. Boren's benefit.

COUNT FOUR

[U.S.C., Title 18, Sec. 1001]

That on or about the 26th day of October, 1954, CHARLES D. FORD, late of San Diego, California, did willfully and knowingly make and cause to be made, false and fraudulent statements and representations in a matter within the jurisdiction of a department or agency of the United States by appearing before Special Agents Francis S. Sullivan and Walter Schlick, at the office of the Intelligence Division, Internal Revenue Service, Los Angeles, California, at Los Angeles, in the Southern District of California, and stated under oath that he had never discussed the Boren case with DEL L. BRANDOW or WILLIAM C. RAU, that he had never solicited employment from Delta M. Boren regarding her tax problems, and that he did not on or about September 8, 1954 call at the home of Delta M. Boren, whereas, as he then and there well knew, he had discussed the Boren case with DEL L. BRANDOW and WILLIAM C. RAU, he had solicited employment from Delta M. Boren, and had on or about September 8, 1954 called at the home of Delta M. Boren.

COUNT FIVE

[18 U.S.C. 371, 26 U.S.C. 7201, 1954 Ed.]

That on or about the 3rd day of September, 1954, the exact date being to the grand jurors unknown, and continously thereafter up to and including the 26th day of November, 1954, in the Southern District of California, WILLIAM C. RAU, late of Los Angeles, California; DEL L. BRANDOW, late of La Canada, California; CHARLES D. FORD, late of San Diego, California; and WILLIAM E. WALLACE, late of Glendale, California, and sometimes hereinafter called the defendants, did unlawfully, knowingly, and willfully conspire, combine, federate, and agree together and with each other to defraud the United States of its right to have the lawful function of its Internal Revenue Service exercised and performed freely from unlawful impairment and obstruction and free from corruption, improper influence, dishonesty and fraud, and to attempt to evade and defeat a large part of the income taxes due and owing to the United States of America by Howard W. and Edith A. Kirch, for the calendar years 1950, 1951, 1952 and 1953, and that during the existence of said conspiracy one or more of the accused, as hereinafter mentioned by name, did the following acts in the furtherance of and to effect the object of the conspiracy as aforesaid:

1. That on or about the 3rd day of September, 1954, WILLIAM E. WALLACE, in the city of Vista,

county of San Diego, did present himself and identify himself as a revenue agent with the Internal Revenue Service, United States Treasury Department, to one Howard W. Kirch, and stated to said Howard W. Kirch that he, Wallace, was assigned to investigate said Kirch's income tax returns for the years 1952 and 1953.

2. That subsequent to the 3rd day of September, 1954, and extending to approximately the 14th day of September, 1954, WILLIAM E. WALLACE did examine books and records of Howard W. Kirch, and in the course of said examination said WILLIAM E. WALLACE stated to Howard W. Kirch that he, Wallace, had uncovered a deficiency of approximately $146,000.00, and that the examination was not yet completed, when in truth and in fact said WILLIAM E. WALLACE knew that this said $146,000.00 of deficiency was false.

3. That on or about the 14th day of September, 1954, DEL L. BRANDOW and WILLIAM C. RAU met with Howard W. Kirch in the offices of WILLIAM C. RAU, in Los Angeles, California, and said WILLIAM C. RAU stated to said Howard W. Kirch that he (Kirch) was in serious tax trouble, and that he, WILLIAM C. RAU, DEL L. BRANDOW and CHARLES D. FORD would represent him before the Internal Revenue Service, and that their fee would be 25% of the amount saved for Kirch.

4. That on or about the 15th day of September, 1954, DEL L. BRANDOW and CHARLES D. FORD

met with Howard W. Kirch and Edith A. Kirch, in Vista, California, at which meeting Howard W. Kirch and Edith A. Kirch signed an agreement with WILLIAM C. RAU, under which terms said WILLIAM C. RAU would endeavor to effect a reduction or elimination of a proposed tentative deficiency assessment of Federal income taxes of approximately $146,000.00 for a 25% contingent fee, and said Howard W. Kirch wrote out one check for $6,000.00 and another check for $2,000.00, both payable to the Twentieth Century Auditors and delivered them to DEL L. BRANDOW, doing business as Twentieth Century Auditors.

5. That on or about the 26th day of October, 1954, DEL L. BRANDOW, WILLIAM C. RAU and CHARLES D. FORD informed Howard W. Kirch that Revenue Agent WILLIAM E. WALLACE would not close Kirch's tax case and make an agreement until they (Rau, Brandow and Ford) received their fee.

6. That on or about the 29th day of October, 1954, Howard W. Kirch, WILLIAM C. RAU, CHARLES D. FORD, DEL L. BRANDOW, and WILLIAM E. WALLACE met in the offices of WILLIAM C. RAU, in Los Angeles, California, and said WILLIAM E. WALLACE delivered Treasury Department Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment, to Howard W. Kirch, in which the Treasury Department, through

WILLIAM E. WALLACE, assessed income taxes of $13,284.58 plus penalties of $1,338.51 upon Howard W. and Edith A. Kirch for the taxable years 1950, 1951, 1952, and 1953, and that Howard W. Kirsch, in the presence of WILLIAM E. WALLACE, presented to CHARLES D. FORD, DEL L. BRANDOW and WILLIAM C. RAU a check in the amount of $24,000.00.

7. That on or about the 26th day of November, 1954, WILLIAM E. WALLACE turned in a report of the tax liability of Howard W. and Edith A. Kirch for the years 1950 and 1953, inclusive, to the Audit Division of the Office of the Director of Internal Revenue, Los Angeles, California, and included with this report a Treasury Department Form 870 with assessed taxes in the amount of $13,284.58 plus penalties of $1,338.51, and that said WILLIAM E. WALLACE recommended that the tax liability of Howard W. and Edith A. Kirch for the years 1950 to 1953, inclusive, be settled for this amount.

COUNT SIX

[26 U.S.C., Sec. 7214(a)(5), 1954 Ed.]

That on or about the 3rd day of September, 1954, the exact date being to the grand jurors unknown, and continuously thereafter up to and including the 26th day of November, 1954, in the Southern District of California, WILLIAM E. WALLACE, being an officer and employee of the United States, to wit: an internal revenue agent acting in connection with a revenue law of the United States,

to wit: 26 U.S.C., Subtitle A., Chapter 1, knowingly made an opportunity for Del L. Brandow, William C. Rau, and Charles D. Ford to defraud the United States of a large part of the income taxes due and owing to the United States of America by Howard W. and Edith A. Kirch for the calendar years 1950, 1951, 1952, and 1953 by recommending an assessment of income taxes in the amount of $13,284.58 and penalties of $1,338.51, and by accepting a check in the amount of $5,000.00 as partial payment of the said $13,284.58 deficiency, which deficiency he knew to be insufficient and of a lesser amount than was actually due to the United States of America.

COUNT SEVEN

[26 U.S.C., Sec. 7214(a)(6), 1954 Ed.]

That on or about the 3rd day of September, 1954, the exact date being to the grand jurors unknown, and continuously thereafter up to and including the 26th day of November, 1954, in the Southern District of California, WILLIAM A. WALLACE, late of Glendale, California, then an officer and employee of the United States, to wit: an internal revenue agent acting in connection with a revenue law of the United States, to wit: 26 U.S.C., Subtitle A., Chapter 1, enabled William C. Rau, Del L. Brandow, and Charles D. Ford to defraud the United States of a large part of the income taxes due and owing by Howard W. and Edith A. Kirch for the calendar years 1950, 1951, 1952, and 1953,

by recommending an assessment of income taxes in the amount of $13,284.58 and penalties of $1,338.51, and by accepting a check in the amount of $5,000.00 as partial payment of this deficiency of $13,284.58, which deficiency he then and there well knew to be insufficient, fraudulent and without basis.

A TRUE BILL

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Foreman

LAUGHLIN E. WATERS
United States Attorney

Bond fixed in the amount of .....

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BIH